

2013 DRAFTING REQUEST

Assembly Amendment (AA-AB462)

Received: **10/29/2013** Received By: **phurley**
Wanted: **As time permits** Same as LRB:
For: **Frederick Kessler (608) 266-5813** By/Representing: **Christina**
May Contact: Drafter: **phurley**
Subject: **Criminal Law - miscellaneous** Addl. Drafters:
Extra Copies:

Submit via email: **YES**
Requester's email: **Rep.Kessler@legis.wisconsin.gov**
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Fine art exception

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/1	phurley 10/29/2013	kfollett 10/29/2013	jfrantze 10/30/2013	_____	sbasford 10/30/2013	sbasford 10/30/2013	

FE Sent For:

<END>

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/1	phurley	11/5/10/29		10/30			

FE Sent For:

<END>

Hurley, Peggy

From: Tenuta, Christina
Sent: Tuesday, October 29, 2013 3:15 PM
To: Hurley, Peggy
Subject: RE: Follow-Up to a Question Re: AB 462

That sounds great. Thanks.

Christina M. Tenuta, J.D.
Office of Wisconsin State Representative Frederick P. Kessler, 12th Assembly District
608-266-5813

From: Hurley, Peggy
Sent: Tuesday, October 29, 2013 3:13 PM
To: Tenuta, Christina
Subject: Re: Follow-Up to a Question Re: AB 462

No problem. It'll say something like "for use in fine art"

Peggy

On Oct 29, 2013, at 3:00 PM, "Tenuta, Christina" <Christina.Tenuta@legis.wisconsin.gov> wrote:

I asked Rep. Kessler this question and he prefers to use the term "fine art" without any definition – he would like to leave that open to the courts to interpret. Is that ok to do?

Thank you, Peggy.

Christina M. Tenuta, J.D.
Office of Wisconsin State Representative Frederick P. Kessler, 12th Assembly District
608-266-5813

From: Hurley, Peggy
Sent: Tuesday, October 29, 2013 2:35 PM
To: Tenuta, Christina
Subject: Re: Follow-Up to a Question Re: AB 462

Hi Christina,

Do you want me to use the term "fine art?" Or maybe "artistic use" (as in, for commercial or artistic use)?

Do you have a definition you'd like to use?

I should be able to have the amendment for you by tomorrow.

Peggy

On Oct 29, 2013, at 2:25 PM, "Tenuta, Christina" <Christina.Tenuta@legis.wisconsin.gov> wrote:

Hi Peggy,

In light of a memo from Melissa Schmidt from Leg Council (contained in email forwarded below) Rep. Kessler is interested in have an amendment drafted to AB 462 for fine art, similar to the exception for commercial purposes, currently contained in the bill. The Exec Session for AB 462 is this Thursday. Is it possible to have the amendment ready for Thursday morning?

Please give a call if you have any questions.

Christina M. Tenuta, J.D.

Office of Wisconsin State Representative Frederick P. Kessler, 12th Assembly District
608-266-5813

From: Schmidt, Melissa

Sent: Tuesday, October 29, 2013 12:20 PM

To: Rep.Kleefisch; Moore, Ashlee

Cc: Rep.Kessler; Sen.Vukmir; Rep.Spiros; Cady, Dean; Bates, Katherine

Subject: Follow-Up to a Question Re: AB 462

Representative Kleefisch,

At the Assembly Committee on Criminal Justice's public hearing on 2013 Assembly Bill 462 (AB 462), relating to distributing a sexually explicit image without consent and providing a penalty, Representative Kessler asked how the bill would apply to "fine art." Specifically, he asked how this would affect a museum's ability to distribute or exhibit paintings of a beach scene with a nude or partially nude person.

Overview of AB 462

AB 462 prohibits a person from reproducing, distributing, exhibiting, publishing, transmitting, or otherwise disseminating, without the consent of the person represented, either of the following: (1) a representation of a nude or partially nude person; or (2) a representation of a person engaging in sexually explicit conduct. The bill also provides that the consent of the person represented to the capture of the representation or to the possession of the representation by the actor is not a defense to a violation of the above prohibitions.

The bill also provides the following exceptions to the above prohibitions:

1. The parent, guardian, or legal custodian of the person represented if the representation does not violate the crime of sexual exploitation of a child or possession of child pornography, and the reproduction, distribution, exhibition, publication, transmission, or other dissemination is not for commercial purposes.

2. A law enforcement officer or agent acting in his or her official capacity in connection with the investigation or prosecution of a crime.
3. A person who is not the actor and who reproduces, distributes, exhibits, publishes, transmits, or otherwise disseminates the representation to a law enforcement officer or agency for the purpose of reporting a crime or for the purpose of assisting a law enforcement officer or agent in an investigation or prosecution of a crime.
4. The person represented consents to the reproduction, distribution, exhibition, publication, transmission, or other dissemination of the representation for commercial purposes.

Application of AB 462 to Paintings

Whether the exhibition of a painting involving a nude or partially nude person would be prohibited under the bill depends in part upon whether a painting is included in the definition of "**representation**." The term "representation" is defined as "a photograph, exposed film, motion picture, videotape, **other visual representation**, or data that represents a visual image." [s. 942.09 (1) (c), Stats., (emphasis added).]

Also, the term, "**captures a representation**" means "takes a photograph, makes a motion picture, videotape, or **other visual representation** or records or stores in any medium data that represents a visual image." [s. 942.09 (1) (a), Stats., (emphasis added).]

While it appears that the definition did not contemplate paintings, a court may interpret the term "other visual representation" to include a painting. However, the bill exempts instances where a person represented consents to the reproduction, etc., for commercial purposes. The bill does not define the term "commercial purposes." If a court were to interpret the definition of a representation to include a painting, it appears that this exception may apply to at least some museum exhibits displaying an exhibit of nude or partially nude persons, if: (1) the person represented consented; and (2) the exhibit is for commercial purposes.

it is also important to note that one of the elements of the crime created by AB 462 is that the defendant reproduced, distributed, exhibited, published, transmitted, or otherwise disseminated the representation of a nude or partially nude person **without the consent of the person represented**. This appears to mean that a prosecutor would have to prove the identity of the nude or partially nude person represented in the painting in order to prove that this person did not consent. Thus, while a court could find that a painting is included in the definition of "representation," if a prosecutor cannot prove the specific identity of the person in the painting, it appears a museum would not be violating the provisions of the bill.

Please let me know if you have any further questions.

Sincerely,

Melissa Schmidt
Senior Staff Attorney
Wisconsin Legislative Council
Ph: (608) 266-2298
Fax: (608) 266-3830

Hurley, Peggy

From: Tenuta, Christina
Sent: Tuesday, October 29, 2013 4:12 PM
To: Hurley, Peggy
Subject: RE: Let's use it

Great. Thank you so much Peggy!

Christina M. Tenuta, J.D.
Office of Wisconsin State Representative Frederick P. Kessler, 12th Assembly District
608-266-5813

From: Hurley, Peggy
Sent: Tuesday, October 29, 2013 4:12 PM
To: Tenuta, Christina
Subject: RE: Let's use it

No problem; I'll put it into editing momentarily and you should have it by tomorrow.

Peggy

From: Tenuta, Christina
Sent: Tuesday, October 29, 2013 4:11 PM
To: Hurley, Peggy
Subject: Let's use it

Rep. Kessler likes the Ch. 129(4) definition of fine art and thinks it should be referenced in this amendment.

Thank you for finding this!

Christina M. Tenuta, J.D.
Office of Wisconsin State Representative Frederick P. Kessler, 12th Assembly District
608-266-5813



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-2771/3
PJH:wlj&eev&cjs:jm

2013 ASSEMBLY BILL 462

October 22, 2013 - Introduced by Representatives SPIROS, JOHNSON, BALLWEG, BARCA, BERCEAU, BIES, BROOKS, CZAJA, KAHL, KLEEFISCH, MARKLEIN, NASS, OHNSTAD, A OTT, PRIDEMORE, THIESFELDT and TITTL, cosponsored by Senators VUKMIR, L. TAYLOR, LEHMAN and RISSER. Referred to Committee on Criminal Justice.

- 1 **AN ACT to create** 942.09 (1) (d) and 942.09 (3m) of the statutes; **relating to:**
2 distributing a sexually explicit image without consent and providing a penalty.

Analysis by the Legislative Reference Bureau

Under current law, no one may photograph, videotape, or otherwise capture an image of a nude or partially nude person (depicted person) without the depicted person's knowledge and consent. A person who does so, or who possesses, reproduces, or distributes the image with the knowledge that the image was captured without the depicted person's knowledge or consent, is generally guilty of a Class I felony, and may be fined up to \$10,000, imprisoned for up to three years and six months, or both.

Under this bill, no one may reproduce, distribute, exhibit, publish, transmit, or otherwise disseminate (distribute) an image of a person who is nude or partially nude or who is engaging in sexually explicit behavior without the consent of the person, regardless of whether the depicted person consented to the capture of the image. A person who does so is guilty of a Class A misdemeanor and may be fined up to \$10,000, imprisoned for up to nine months, or both.

Under the bill, the prohibition does not apply if the person depicted consented to the distribution for commercial purposes. The bill creates exceptions for parents or legal guardians who distribute otherwise legal representations of their minor children for noncommercial purposes, for law enforcement officers acting in their official capacity, and for persons who distribute the representations for the purpose of reporting or assisting with the investigation of a crime.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a

ASSEMBLY BILL 462

report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 942.09 (1) (d) of the statutes is created to read:

2 942.09 (1) (d) "Sexually explicit conduct" has the meaning given in s. 948.01
3 (7).

4 **SECTION 2.** 942.09 (3m) of the statutes is created to read:

5 942.09 (3m) (a) Whoever, without the consent of the person represented,
6 reproduces, distributes, exhibits, publishes, transmits, or otherwise disseminates a
7 representation of a nude or partially nude person or of a person engaging in sexually
8 explicit conduct is guilty of a Class A misdemeanor. The consent of the person
9 represented to the capture of the representation or to the possession of the
10 representation by the actor is not a defense to a violation of this subsection.

11 (b) This subsection does not apply to any of the following:

12 1. The parent, guardian, or legal custodian of the person represented if the
13 representation does not violate s. 948.05 or 948.12 and the reproduction,
14 distribution, exhibition, publication, transmission, or other dissemination is not for
15 commercial purposes.

16 2. A law enforcement officer or agent acting in his or her official capacity in
17 connection with the investigation or prosecution of a crime.

18 3. A person who is not the actor and who reproduces, distributes, exhibits,
19 publishes, transmits, or otherwise disseminates the representation to a law
20 enforcement officer or agency for the purpose of reporting a crime or for the purpose

ASSEMBLY BILL 462

1 of assisting a law enforcement officer or agent in an investigation or prosecution of
2 a crime.

3 (c) This subsection does not apply if the person represented consented to the
4 reproduction, distribution, exhibition, publication, transmission, or other
5 dissemination of the representation for commercial purposes.

6 (END)



State of Wisconsin
2013 - 2014 LEGISLATURE



LRBa1088/1
PJH...

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ASSEMBLY AMENDMENT ,
TO ASSEMBLY BILL 462

By 10-30-13

✓

1 At the locations indicated, amend the bill as follows:

2 1. Page 3, line 5: after "purposes" insert "or for use in a work of fine art, as
3 defined in s. 129.01 (4)".

4 (END)